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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1361

FRED BALDRIDGE, TRAVIS W. TAYLOR and HERMAN D. TERRY,

Petitioners,

vs.

JOHN R. HADLEY, J. D. MONTOYA and ED GARY, individually and as members of THE NEW MEXICO STATE AGRICULTURAL STABILIZATION and CONSERVATION COMMITTEE; and CLIFFORD M. HARDIN as Secretary of Agriculture of the United States, COMMODITY CREDIT CORPORATION,

Respondents,

and

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Petitioners present their petition for a rehearing of this Court's order dated May 28, 1974, denying the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, a suspension of the effect of the denial and leave until July 1, 1974, to file this petition having been granted by Mr. Justice Byron R. White on June 4, 1974.

GROUNDS FOR REHEARING

1. REPLY TO THE MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION. The government characterizes the issues here as being "factual". Nothing could be farther removed from the truth than that. There has never been any substantial dispute about the facts. The deeds from Draper, the seller, to the purchasers, their notes and mortgages to Draper, the respective escrow contracts with Fred Baldridge, the escrowed deeds, the subsequent releases by Draper, and delivery of the deeds when the C.R.P. contracts were wrongfully terminated, have not been attacked by the government. These careful steps taken by the participants to stay strictly within the regulations, 7 C.F.R. §750.150, et seq., stand completely unimpeached and, in truth, not controverted. The issues here are strictly those of law. When the facts are undisputed, a determination of fraud is a question of law. 37 Am.Jur.2d, Fraud and Deceit, §19, p.44; 37 C.J.S., Fraud, §123, p.450. The government states that there was no purpose for the

"complicated scheme" other than to evade the maximum payment limitation. The conveyancing had here was not complicated, but rather elementary, and the purpose was to insure that there were no violations either of the regulations or of the purpose of the Soil Bank Act. Fred Baldridge never received more than $5,000 in any one year from the Department of Agriculture. To state otherwise is to foster on this Court a deliberate untruth.

The government next takes the position that New Mexico law of real property is not a factor. Petitioners rely upon Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740 (1941), which is a famous case in New Mexico jurisprudence holding that a deed placed in escrow to be delivered upon a condition subsequent will be given effect as of the date of the final or effective delivery. This is the law everywhere, and were there a federal common law as to real property, petitioners believe that such would be the decision of this Court. 48 A.L.R. 405; 54 A.L.R. 1246; 117 A.L.R. 69; 28 Am.Jur.2d, Escrow, §10, p.15; 30A C.J.S., Escrow, §9, p.993; 26 C.J.S., Deeds, §40, p.670; Restatement Law of Property, §9, Comment c., Id. §153, Comment on Subsection (1)c. In support of its statement that actions under the Soil Bank Act are governed strictly by federal law, whatever that may be, the government cites three (3) cases, to-wit: Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943); United States v. Sommerville, 324 F.2d 712 (Cir. 3, 1967);

and Reimann v. United States, 315 F.2d 746 (Cir. 9, 1963). None of these even remotely support the statement for which cited.

Clearfield Trust Co., supra, confined itself to the law merchant, i.e., could there be recovery a year and a half after negotiation on an indorsement forged on a government check contrary to Pennsylvania law. This case on its own facts is of dubious validity now in view of the fact that 49 of the 50 states have adopted the Uniform Commercial Code which effectively resolves the issue uniformly. But at the least Clearfield has nothing to do with real property.

Sommerville, supra, similarly falls into the commercial law category as it concerned cattle sold by an auctioneer which were subject to a security agreement in favor of the Farmers Home Administration. The Tenth Circuit from which the case at bar originates, reversed itself, or at the least retracted, in Mitchell v. Sheppard Mall State Bank, 458 F.2d 700 (Cir. 10, 1972), which held that the Uniform Commercial Code provisions of state law are the appropriate sources of federal law. Sommerville cannot possibly be authority for any principle involved in the case at bar.

Reimann v. United States, supra, stands for precisely the opposite of what the government contends. It concerned the validity of a Soil Bank Contract executed by a husband as to lands in Idaho which is a community property state. The wife did not join

in executing the contract, which failure the husband contended made the contract void. The Ninth Circuit stated:

> "But we need not, and do not, decide whether we should adopt, for the purpose of this decision, the law of Idaho as being the federal law in relation to what authority a husband has, and to what constitutes an encumbrance . . . . We assume, for the purposes of this case, that Idaho law should be the standard we adopt, since this is appellant's position."

The court then went on to decide that the husband under Idaho law could validly enter into a Soil Bank Contract without the wife joining. In all fairness, Reimann supports petitioners.

The government should not be permitted to cite authority that is so wide of its mark. Of course, the excuse for so doing is that there is not a single case from this Court which holds that long standing principles of state real property law can be ignored notwithstanding a federal interest. U.S. v. Little Lake Misere Land Company, Inc., 412 U.S. 580, 93 S.Ct. 2389 (1973); U.S. v. Burnison, 399 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1950); C.I.R. v. Estate Bosch, 387 U.S. 456, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967). Petitioners are unable to find in the instant case moral grounds necessitating so drastic a departure from what has so long been settled law.

The decision in United States v. Lazy F C Ranch, 481 F.2d 985 (Cir. 9, 1973), is brushed off by the government as not being in conflict with the opinion of the Tenth Circuit in the case at bar on the ground that the partners had relied on the advice of the county A.S.& C.S. manager in making the leases which quadrupled their collective income from the Acreage Reserve Contracts. Amazingly, the government there stipulated that there was no "scheme or device". This got the A.S.& C.S. manager off the hook, so to speak, despite the fact that the partners were trying to maximize their income from the contracts. Notwithstanding, the partners admittedly received monies in excess of the maximum payment limitations. The Ninth Circuit simply held that the government had received full benefits from the land taken out of production and the partners had lost their profits from farming, so that there was no good reason for requiring them to return the monies received just because those monies exceeded the maximum payment limitation. The prohibition is against receiving more than $5,000 from the contracts in any one year. Whether received as the result of a "scheme or device" is immaterial.

It is shocking to note that Fred Baldridge never did receive payments exceeding the maximum limitation, but is being required to return payments admittedly received by others anyhow. Further, Fred Baldridge never even tried to maximize the annual payments to himself. Every effort was exerted, and petitioners think successfully, to

do just the opposite. If there was no "scheme or device" in Idaho, there can be none in New Mexico. There is no rationale that can equate ownership of the land after the Soil Bank Contracts are terminated as being the same thing as receiving more than $5,000 per year. It was not the parties intent for any to receive more than the regulations allowed. Further, they didn't. Finally, the government has not been damaged just as it was not damaged in Lazy F C Ranch, supra.

The disposition of this property after the conclusion of the Soil Bank Contracts cannot in any sense be a concern of the government. For Baldridge to be treated as others have not, would require review of every Soil Bank Contract that was made which is an administrative impossibility. The results in this case and Lazy F C Ranch, supra, are irreconcilable. Government application of what it thinks is the law mocks every "American ideal of fairness".

2. THE TENTH CIRCUIT CANNOT CONVERT THIS CASE INTO AN ACTION TO REFORM WRITTEN DOCUMENTS. The government approach has been that notwithstanding the documents that were executed, they are meaningless, ineffective, worthless, void, and the government, with or without documents, will determine what the parties meant and simultaneously determine the legal effect of this implied meaning. Not argued in this Court was the evidentiary side of the issues from the standpoint of both federal and state law. In order to

achieve the result had by the Tenth Circuit it is necessary to set aside or else hold void or otherwise rewrite the following written instruments between the parties:

(1) Warranty Deeds:

(a) Draper to Taylor. (Ex. 27).
(b) Draper to Henderson. (Ex. 29).
(c) Draper to Adams. (Ex. 31).
(d) Draper to Henry E. Baldridge, Jr. (Ex. 33).
(e) Draper to Terry. (Ex. 35).
(f) Draper to Fred Baldridge. (Ex. 37).

(2) Mortgages:

(a) Taylor to Draper. (Ex. 40).
(b) Henderson to Draper. (Ex. 41).
(c) Adams to Draper. (Ex. 42).
(d) Henry E. Baldridge, Jr. to Draper. (Ex. 43).
(e) Terry to Draper. (Ex. 44).
(f) Fred Baldridge to Draper. (Ex. 45).

(3) Promissory Notes:

(a) Taylor to Draper. (Ex. 13).
(b) Henderson to Draper. (Ex. 14).
(c) Adams to Draper. (Ex. 15).
(d) Henry E. Baldridge, Jr. to Draper. (Ex. 16).
(e) Terry to Draper. (Ex. 17).
(f) Fred Baldridge to Draper. (Ex. 18).
(g) Draper to Fred Baldridge. (Ex. 20).

(4) Contracts With Escrowed Deeds:

(a) Taylor and Fred Baldridge. (Ex. 21).
(b) Henderson and Fred Baldridge. (Ex. 22).
(c) Adams and Fred Baldridge. (Ex. 23).
(d) Henry E. Baldridge, Jr. and Fred Baldridge. (Ex. 24).
(e) Terry and Fred Baldridge. (Ex. 25).
(f) Draper and Fred Baldridge. (Ex. 26).

(5) Conservation Reserve Contracts between Department of Agriculture and:

(a) Taylor. (Ex. 142).
(b) Henderson. (Ex. 3).
(c) Adams. (Ex. 5).

(d) Henry E. Baldridge, Jr. (Ex. 6 & 7).
(e) Terry. (Ex. 8).
(f) Fred Baldridge. (Ex. 9).
(g) Draper. (Ex. 10 & 11).

This requires reformation of 26 instruments, i.e., 5 warranty deeds, 5 mortgages, 5 notes, 6 contracts, between the parties, and 5 Conservation Reserve Program contracts by substituting the name of Fred Baldridge wherever the names of Taylor, Henderson, Adams, Henry E. Baldridge, Jr., and Terry appear. The magnitude of the lower courts' broad brush cover-up of 26 instruments, all of which were stipulated into evidence, is unbelievable.

The Tenth Circuit in most ungentlemanly words, and petitioners think in gross violation of the language and the spirit of the Code of Judicial Conduct, stated:

> "We are of the opinion that the trial court was eminently correct in ignoring the forms which were erected and recognizing the true facts. Counsel for Baldridge argues that this was all legal and therefore non-fraudulent. We disagree. The arrangement has the evidences of a devious sham which was designed to deceive. Its elaborate legal structure, while giving it the look of legality, does not bear scrutiny." (Emphasis writer's). Petition For Writ of Certiorari, Attachment 2, p.11.

The implications of this quotation are startling and fearsome. It projects a judicial tyranny which is not only incomprehensible but intolerable in American jurisprudence. No court, federal or state, should be permitted to let such outrageous theories stand as law in this nation. Authority from this Court is not lacking on the meaning and effect to be given written instruments.

In Howland v. Blake, 97 U.S. 624, 94-97 S.Ct. 1027, 24 L.Ed. 1027 (1878), in a suit to reform a deed, this Court said:

> "where a written instrument is sought to be reformed . . . ." "the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence." (Emphasis writer's).

Singularly, there is no testimony or evidence at all that the written instruments were intended by the parties to mean anything other than what they said.

On the contrary, the parties meticulously followed the text of the instruments. The language of Howland v. Blake, supra, was adopted in toto in Northwestern Mutual Life Insurance Company v. Nelson, 103 U.S. 544, 102-105 S.Ct. 437, 26 L.Ed. 436 (1880), which stated:

> "Where a deed or mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor is attached, the evidence to impeach it should be clear and convincing." (Emphasis writer's).

Not only did the Tenth Circuit deliberately ignore the deeds, mortgages, notes, contracts, and releases, all contrary to established precedent, but by doing so it elevates a lawful and simple transaction into fraud. This is to say that the lower court presumed fraud. This cannot be done. Kempner v. Churchill, 75 U.S. 362, 8 Wall. 362, 74-77 S.Ct. 461, 19 L.Ed. 461 (1869).

In Carpenter v. The Providence Washington Insurance Company, 45 U.S. 185, 4 How. 185, 42-45 S.Ct. 931, 11 L.Ed. 931 (1846), where an insured alleged fraud in his insurer not endorsing on his policy the fact of procurement of other insurance, this Court said as to proof required of fraud:

> "and so grave a charge as fraud, by very satisfactory auxiliaries . . . that is by evidence which is 'irrefragable,' and not open 'to opposing presumption.'"

The evidence to prove fraud is considerably more than that required by a mere preponderance of the evidence. Proof of fraud must be made by "clear evidence". Oriel v. Russell, 278 U.S. 358, 49 S.Ct. 173, 73 L.Ed. 419 (1929).

It is noted that the trial court, without reason, refused to give credence to Fred Baldridge's unimpeached and uncontradicted testimony that he offered all of the documentation to Mr. Joe Peterson, the Lea County, New Mexico, A.S.& C.S. Manager, who refused to look at them. This was improper under both state and federal law. Rowdon v. Stanley, 455 F.2d 482 (Cir. 10, 1972); Aragon v. Boyd, 80 N.M. 14, 450 P.2d 614 (1969).

Petitioners have looked long and hard to try to find some precedent that supports the lower courts' determination that the deeds, mortgages, notes, contracts, and releases are a "sham". The only case surfacing in this regard is one where a group of decedent's children brought suit to set aside a parent's deed to another child where in Gregory v. Lloyd, 284 F.Supp. 264 (D.C. Fla., N.D., 1968), that court said:

> "The deed in this case was challenged also on the ground

> that it was a sham deed. It is clear that the deed was, in fact delivered, so that it could not under any circumstances, be a sham deed. For the deed to be a sham there would have to be evidence that the parties did not intend for it to be effective as a duly delivered deed conveying title, and no testimony or evidence indicates that such was the case." (Emphasis writer's).

It is not arguable but that the parties performed fully in all respects according to the requirements of their deeds, mortgages, notes, and contracts. It is equally obvious that each intended these instruments to be effective according to their texts. Where, then, is there any basis for the Tenth Circuit to messiah-like abrogate the parties' plain agreements under which each had fully performed? More especially where is there any basis for the Tenth Circuit to attach the stigma of fraud and deceit as if the documents had never existed? There is in the Tenth Circuit's opinion a lack of competence in judgment that provokes a justifiable cynicism. There has not been one single element of fraud proven as it is known to the law. Petitioners have discussed this at length in their Point V of the Petition For Certiorari, p.30. For the Tenth Circuit's decision to stand in the face of and contrary to not only its own precedent but also the precedent of this Court, would be a tragedy to the law as it is known and practiced in this country.

3. THERE IS NEITHER STATUTORY, REGULATORY, NOR CASE LAW CREATING A LEGAL LIABILITY ON FRED BALDRIDGE TO RETURN MONIES WHICH HE NEVER RECEIVED. Petitioners in their Point III, at page 23 of the Petition For Certiorari, dealt with one aspect of this issue, that is, to permit recovery of monies not received by Fred Baldridge is to create a new substantive legal liability without legislative aid contrary to U.S. v. Standard Oil Co. of California, 332 U.S. 301, 67 S.Ct. 1604, 91 L.Ed. 2067 (1947). But aside from this, the administrative interpretations forestall any such liability.

A. USE OF SOIL BANK ACT PAYMENTS TO PURCHASE DRAPER'S LAND WAS LEGAL AND APPROVED BY THE DEPARTMENT OF AGRICULTURE AND CONGRESS.

The basis of the government's contention is that the C.R.P. paid for the land. Fred Baldridge only bought one section of land with C.R.P. monies. Taylor, Henderson, Adams, Henry E. Baldridge, Jr., and Terry bought their own land. There is no question but that the C.R.P. payments paid for the land purchased by the six. The C.R.P. payments bought practically all the farm land that was sold in New Mexico during this period. One has to be extremely naive to think that the Department of Agriculture thought otherwise. It is this lingering naivete which apparently directed the lower courts to disregard 26 written instruments and presume fraud. This erroneous conclusion is wholly dispelled by what the Department of

Agriculture and the Congress actually approved. There simply is no moral issue involved as the lower courts would have one believe.

The H.R. Hearings Before the Subcomm. of the Comm. on Appropriations, 86th Cong., 1st Sess. (1960), and 85th Cong., 2nd Sess. (1959), specifically approved those sales to even family members with vendor liens or mortgages back to the seller, usually a close relative. The regulations, 7 C.F.R. §750.170, shown in Appendix to Petition For Certiorari at page B-65, specifically provided for the assignment of C.R.P. payments without limitation as to purpose. Petitioners see no moral violation in this approved practice. If the Department of Agriculture approves such and the Congress impresses its approval on it also, how can the courts arbitrarily label it fraud?

Further, the H.R. Hearings, supra, are replete with examples that you did not have to be a career farmer to qualify as a "producer" under the regulations. In order to be a "producer" all you had to be was an "owner or landlord" under 7 C.F.R. §750.150(q). Equally, the regulations provided that individuals having family relationships could be considered as "separate producers" under 7 C.F.R. §750.164(b)(5). In fact this situation of family relationship was one of the main thrusts of the H.R. Hearings, supra. Any lawyer who practiced in New Mexico's rural area drafted deeds, notes, and mortgages by the score between parents and their children and grand-

children. Petitioners are certain that not one lawyer had the remotest idea that he was committing a moral sin by so doing. But if morality is an issue, as the Tenth Circuit would have you believe, then the respective County Agricultural Stabilization and Conservation Service Offices of the Department of Agriculture were accessories to the fact because they knew of all these family relationships and the circumstances of each purchaser or donee, i.e., whether career farmers or not, and approved every single C.R.P. contract so presented. So did the Lea Co. A.S. & C.S. office in the instant case. The massive scale upon which this was done can best be illustrated by what occurred in Fred Baldridge's home county, Curry County, New Mexico, where 677 C.R.P. contracts were executed out of 1,100 farms, constituting 35% of the county's total cropland. Petition For Certiorari, Attachment 10, page 361. If the Department of Agriculture was wrong in promulgating its regulations so as to permit anyone to buy land with C.R.P. payments, then it was wrong on literally thousands of C.R.P. contracts. Furthermore, if it was wrong, Congress clearly acquiesced in it. That one today thinks it not a wise policy, does not make it immoral or illegal at a time some fifteen years earlier when the economic condition of the farmer was so vastly different. Petitioners cannot reconcile the Tenth Circuit's determination with this Court's decision in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080 (1973), and Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969),

which held that the administering agency's execution of a statute should be followed especially where Congress has refused to alter the administrative construction. Petitioners submit that the purchase of the land by Fred Baldridge and the five others was perfectly legal and without moral stigma of any sort whether or not the land was paid for with C.R.P. payments. To hold otherwise is to label thousands of American farmers as thieves, defrauders and swindlers. They were none of these, and it is shameful and derogatory for the Tenth Circuit to so imply.

B. ACQUISITION OF THE LANDS BY FRED BALDRIDGE.

Petitioners assert that the transaction between the five other purchasers and Fred Baldridge is entirely and necessarily separate and distinct from their respective acquisitions of the lands with C.R.P. payments. It is at this point that the logic, if any, of the lower courts falls apart. This was the most simple of transactions. After it was ascertained that the C.R.P. contracts would receive approval about one year after the delivery of the deeds, notes, and mortgages with Draper, the five entered into a contract with Fred Baldridge whereby he would make the land comply with the C.R.P. contracts, and when those C.R.P. contracts were completed, the land would become his by delivery to him of a warranty deed which was escrowed with the contract. It should be remembered that at this time these lands were heavily encumbered with a first mortgage of some $40,000 to

Connecticut Mutual Life Insurance Co., a second mortgage of $61,058.99 to Farmers Home Administration, a third mortgage to Amos Harper for $56,372.00, and a fourth lien to Commodity Credit Corporation for between $4,000 and $5,000, all of which totalled $161,430.99. All of these mortgages were prior to the purchasers' mortgages to Draper which is why the purchasers' mortgages to him provided for no deficiency judgment. Further, at this time the C.R.P. contracts were not approved and payments on them were dependent on appropriated money, and there was great question in the farmers' minds whether the C.R.P. payments would be made.

In order for the trial court to arrive at a result of liability on Fred Baldridge for all payments received and spent by five different people, it took some extraordinary maneuvering. The trial court did this by calling the five purchasers "agents" of Fred Baldridge. There is not one word concerning agency in the evidence. Not a single witness testified that in the purchase of these lands that Fred Baldridge was their agent, and there is no documentary evidence to support any such conclusion. Each of the purchasers received a warranty deed from Draper, and executed his note and mortgage to Draper and performed thereunder. Even had there been a secret or unexpressed intention that the others were agents of Fred Baldridge, the words used in the deed control and cannot be orally shown to mean otherwise. Sharpe v. Smith, 68 N.M. 253, 360 P.2d 917 (1961); Westover v. Harris, 47 N.M. 112, 137 P.2d

771 (1943). These deeds, notes, and mortgages mean exactly what they say, so that each purchaser became the owner. About a year later they executed a contract with Fred Baldridge and escrowed a deed to be delivered at a date after the respective C.R.P. contracts terminated, none of which contracts can possibly be subject to construction as there is no ambiguity. Moran v. Prather, 90 U.S. 492, 23 Wall. 492, 90-93 S.Ct. 121, 23 L.Ed. 121 (1874); Major v. Bishop, 462 F.2d 1277 (Cir. 10, 1972). It was not within the province of the lower courts to interpolate what the parties to these unambiguous instruments have not themselves stipulated or intended. Ingle v. Jones, 69 U.S. 1, 2 Wall. 1, 66-69 S.Ct. 762, 17 L.Ed. 762 (1864); State of Maryland v. Baltimore & Ohio Rr. Co., 89 U.S. 105, 22 Wall. 105, 86-89 S.Ct. 713, 22 L.Ed. 713 (1874); Woodson v. Lee, 73 N.M. 425, 389 P.2d 196 (1963); Hopper v. Reynolds, 81 N.M. 255, 466 P.2d 101 (1970). What the lower courts are doing is to make a new contract for the parties which is different in all vital particulars from that which they actually made and intended. Gavinzel v. Crump, 89 U.S. 308, 22 Wall. 308, 86-89 S.Ct. 783, 22 L.Ed. 783 (1875); Lawber v. Bangs, 69 U.S. 728, 2 Wall. 728, 66-69 S.Ct. 768, 17 L.Ed. 768 (1864).

The only conclusion to all of this is that there is no basis in law or fact, first, that the original purchasers from Draper were in any way tainted with fraud because the land was paid for with C.R.P. payments, second, that the acquisition of these lands by Fred Baldridge from the purchasers was according to their

respective contracts, all of which were perfectly open and aboveboard and in accordance with the law of New Mexico real property, and third, that the lower courts cannot disregard 26 simple written instruments to determine fraud.

The absurdity of the lower courts' holding is seen in the result. They are saying that if predecessors in ownership purchase land with C.R.P. payments, as they could legally do, nonetheless those payments will be treated as if received by the predecessors' grantee under another C.R.P. contract at the same time as received by the predecessor in ownership, so as to make the grantee exceed the $5,000 maximum annual payment limitation. This reasoning is ridiculous because there is no end to it. It would make anyone who at one time had a C.R.P. contract in violation of the maximum payment limitation if he had acquired land that someone else had bought with C.R.P. payments. In contrast, we know that parts of farms were sold and C.R.P. payments were assigned to the seller to pay the note and mortgage, while at the same time the seller had a C.R.P. contract on land retained yielding him the maximum $5,000 per year, yet this is held not to violate the maximum payment limitation. (H.R. Hearings, supra). In truth, the latter situation is definitive of the purpose of the $5,000 maximum annual payment limitation in that such limitation must apply only to C.R.P. contracts executed by a single owner, otherwise the seller with a C.R.P. contract on lands retained in the note and mortgage situation would be exceeding

the maximum payment limitation. Under the weak theory applied in the instant case, if one owner had a C.R.P. contract yielding $5,000 per year, and he received from any source money or anything that was the result of another C.R.P. contract, he would have exceeded the $5,000 maximum annual payment limitation. This was not and cannot be.

You cannot predicate fraud on supposition or presumption. Fraud is a specific concept and not nebulous or fanciful or imagined. In this case it is defined by Pacific Royalty Co. v. Williams, 227 F.2d 49 (Cir. 10, 1956), c.d., 351 U.S. 951, 76 S.Ct. 847, 100 L.Ed. 1474, which was adopted in Sauter v. St. Michael's College, 70 N.M. 380, 374 P.2d 134 (1962), by the New Mexico Supreme Court. There must be a false representation of a material fact which at the very most could not be more than an unknowing opinion expressed as to a matter of ownership in the instant case, which expression is wholly insufficient under both federal and state law. State Farm Mutual Automobile Insurance Company v. Petsch, 261 F.2d 331 (Cir. 10, 1958); Agnew v. Landers, 59 N.M. 54, 278 P.2d 970 (1955). There must be knowledge of the false fact when made which is lacking both as to its characterization as fact when it was legal opinion based upon counsel's advice and obviously lacking as to knowledge. There must be an intent to deceive which could not possibly exist when none of the parties knew, or believe today, that a false representation was made. The lower courts apparently think that because the C.R.P. payments paid for

the land of the six purchasers that this created an evil motive. That it does not and cannot is quite apparent from the H.R. Hearings, supra. As to the last required element, reliance and damage, the A.S. & C.S. was perfectly justified in relying on the recorded deeds and mortgages securing the notes because such were true in fact and law. As to damage, there was none here just as there was none in U.S. v. Lazy F C Ranch, 481 F.2d 985 (Cir. 9, 1973), because the land was taken out of production and the government received its quid pro quo. There is no rationale whereby fraud can be made out of these transactions.

A fortiori, if there is no fraud, how can Fred Baldridge be held liable for some $300,000 which he never received? There was nothing illegal or immoral in Taylor, Henderson, Adams, Henry E. Baldridge, Jr., and Terry purchasing these lands with C.R.P. payments. Does it become a fraud when they desire to give this land to Fred Baldridge after termination of the C.R.P. contracts some ten years later? If so, where and upon what basis do you find the elements required to prove fraud? Is it the fact that Fred Baldridge ends up ten years later the beneficiary of the largess of his relatives? Where is there anything that even distantly smacks of the idea that there was any restriction on his relatives gifting the land for which they no longer had use or desired to retain to Fred Baldridge? There could be no fraud unless it was fraudulent for them to make the original purchase with C.R.P. payments. That such original

purchases were legal and valid cannot be disputed. One can only conclude that there can be no liability on Fred Baldridge for monies not received by him which in part went into the purchase of these lands by the others. This is fair in all respects to the government because all it wanted was to have the land removed from production as it was. The fact that his relatives wanted him to have the land after termination of the C.R.P. contracts cannot be a factor because he has not misused the purpose of the Soil Bank Act in any respect. That the lower courts do not like that statute or the regulations pursuant to it, still is no basis for a finding of fraud. Surely counsel in drawing these instruments should not have to speculate on whether this court or that court will or will not like it. Such instruments are drawn in accordance with accepted legal principles of the state where the land is located. It cannot be done in any other way, and no one with any experience in legal practice would think of doing it any other way. This is a clear case of mistaken law and poor judgment by the lower courts. The magnitude of the matter alone deserves the attention of this Court.

CONCLUSION

Petitioners recognize that they are but a few small fish in a pond without limit. They further recognize that this Court has before it at all times issues of the law and the Constitution that in many instances admit of no complete solution. It is perhaps true that this

Court is just too occupied with wholly national issues that it cannot give any substantial time to insure that there will not be an economic crucifixion of an upright and decent man like Fred Baldridge. But the fact is, as all old lawyers know, that the various Circuit Courts are not nearly as careful and much less infallible than they would have you believe. Sometimes their errors are harmless but the result is close to right. Other times, as here, their errors are gross and the result so enormously awry, that there is a responsibility on this Court, despite its huge workload, to do something affirmative to get the case back on the track.

It is petitioners suggestion to this Honorable Court that this case, with or without grant of the certiorari, be remanded to the Tenth Circuit for reconsideration on the principles discussed in Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 93 S.Ct. 2080 (1973), and Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), in the light of H.R. Hearings Before the Subcomm. of the Comm. on Appropriations, 85th Cong., 2nd Sess. (1959), and 86th Cong., 1st Sess. (1960), that the Tenth Circuit be directed to determine all issues of real property law in accordance with that had in New Mexico, and that the issues of fraud, if such remain after decision on the aforegoing, be determined in accordance with existing law of the Tenth Circuit as shown in Pacific Royalty Co. v. Williams, 227 F.2d 49 (Cir. 10, 1956), c.d., 351

U.S. 951, 76 S.Ct. 847, 100 L.Ed. 1474, which was adopted in New Mexico in Sauter v. St. Michael's College, 70 N.M. 380, 374 P.2d 134 (1962).

By this Court assuming a limited jurisdiction, not involving a measurable expenditure of time, there should be a good chance that the Tenth Circuit would get back on the track without its usual stubbornness and decide this case based upon proper legal direction without emotional involvement. The huge amount of money, in excess of $300,000, is significant and not a usual thing even in this Court. But the stigma attaching to Fred Baldridge and his family of an adjudication of fraud is simply unbearable. There is no better hardworking farmer and stockman in this county than he. Counsel for petitioners believe that the opinion of the Tenth Circuit reflects adversely on their ethics and without any justification whatsoever. Adding it all up, the decisions of the lower courts are unconscionable from any direction. Petition for certiorari or remand for reconsideration is merited.

Respectfully submitted,

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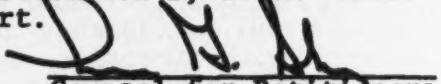
By:

CERTIFICATE OF COUNSEL

I, Lynell G. Skarda, counsel for the above-named petitioners, do hereby certify that the foregoing Petition For Rehearing on Petition For Writ of Certiorari is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.



Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Lynell G. Skarda, one of the attorneys for the Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 26th day of June, 1974, I served copies of the Petition For Rehearing on Petition For Writ of Certiorari on the several parties thereto, as follows:

1. On The Solicitor General, Department of Justice, Washington, D.C., 20530, by mailing three (3) copies in a duly addressed envelope, with airmail postage prepaid.

2. On Robert E. Kopp and Michael H. Stein, Appellate Section, Civil Division, U. S. Department of Justice, Washington, D.C., 20530, by mailing three (3) copies in a duly addressed envelope, with airmail postage prepaid.

LYNELL G. SKARDA